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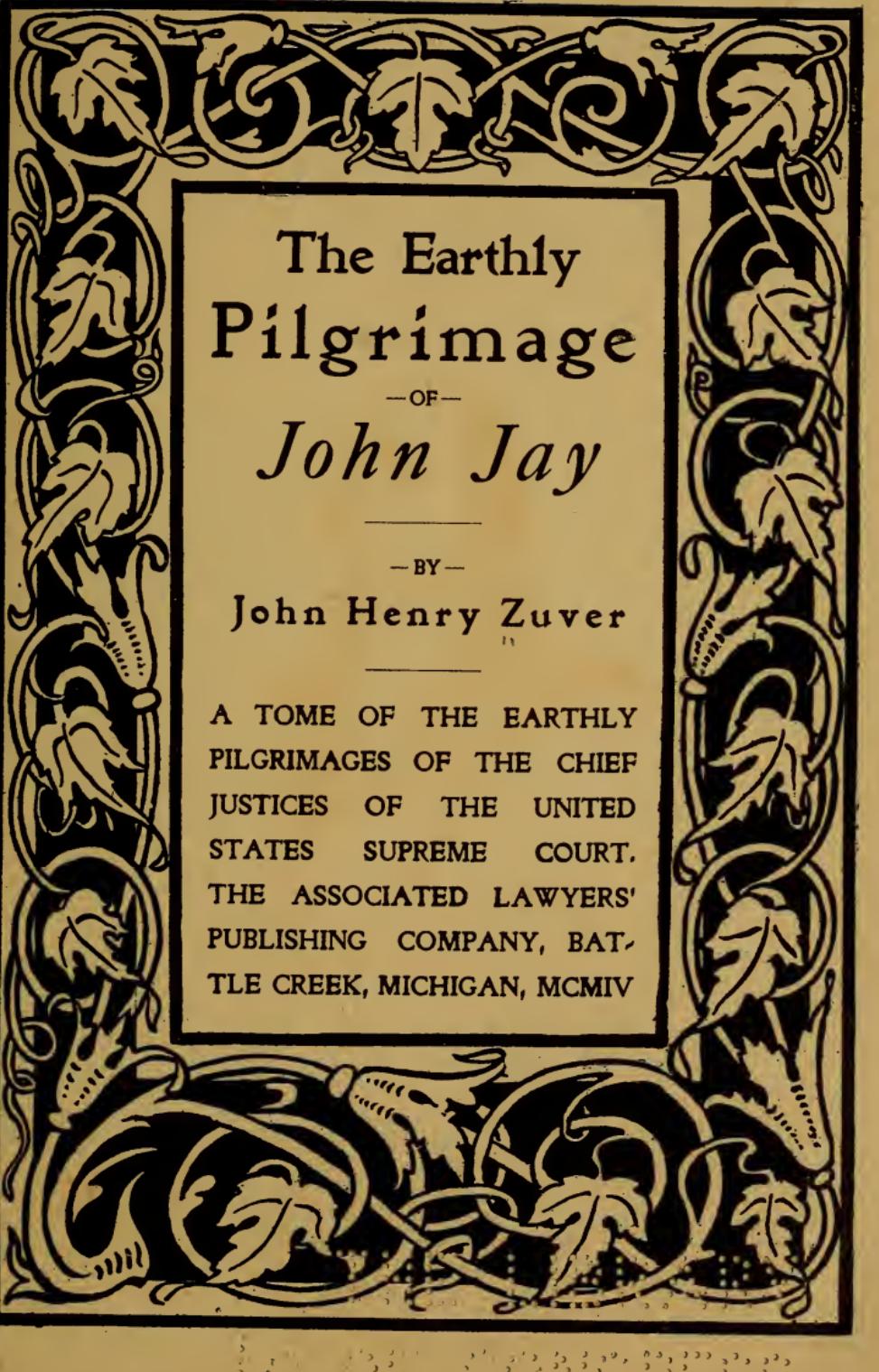




John Fay



JOHN JAY



The Earthly
Pilgrimage

—OF—

John Jay

—BY—

John Henry Zuver

A TOME OF THE EARTHLY
PILGRIMAGES OF THE CHIEF
JUSTICES OF THE UNITED
STATES SUPREME COURT.
THE ASSOCIATED LAWYERS'
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Earthly Pilgrimage Of John Jay.



THE INK which marked President Washington's approval of the Federal Judiciary Act of 1789 was scarcely dry, when that functionary sent to the United States Senate the following names: For Chief Justice, John Jay; for Associate Justices, John Rutledge, James Wilson, William Cushing, Robert H. Harrison, and John Blair. At the same time the name of Edmund Randolph was proposed for Attorney General. Two days later, on September 26, the entire slate was confirmed, and John Jay was assigned the page in history devoted to the first Chief Justice of the United States Supreme Court.

At that time he was forty-four years of age, and well known throughout the New Republic as a good citizen, a loyal patriot, an able lawyer, an honest politician, a far-seeing statesman, and a skillful diplomat. The opportunity was here afforded him to demonstrate his qualifications as a jurist.

He embraced the opportunity, history tells us, even in advance of his appointment, having been tendered by Washington his choice of the Federal offices, because of the high regard in which the

first President held him. He chose the Chief Justiceship, and it was given him, because neither the President nor the Senate feared that he would "hesitate a moment to bring into action the talents, the knowledge, and integrity which were so necessary to be exercised at the head of that department, which must be considered as the keystone of our political fabric."



JOHN JAY entered this life at the city of New York, on the twelfth day of December, Anno Domini, one thousand seven hundred and forty-five. The first thing he did was to start for the grave, a direction in which he traveled throughout his earthly pilgrimage, which endured for eighty-three years, five months, and five days. Then that peaceful retreat was opened to receive him at Bedford, in York State,—forty miles distant from the point of his birth,—where he was delivered into its bosom from an attack of palsy, on May 17, 1829.

Between the hour of his birth and the hour of his death were transacted those deeds of life which made John Jay famous,—save, perhaps, the influence of heredity and the accretions of history. He was the youngest of a family of eight children, and the sixth son. Peter Jay was his father, and Mary Jay his mother. The father was of French descent, and the mother was of Dutch extraction. The father was wealthy, and the mother was rich. The father inherited well from the grandfather, Augustus Jay, and by thrift and industry increased the inheritance greatly. The mother was the

daughter of Jacobus Van Cortlandt, of manorial prominence, from whom, through her, the first Chief Justice inherited the estate of his retirement, where he spent his declining years — after a long and valuable public service.

Peter and Mary intended John for the law from the start, and he was doubtless given the best preparatory education that the times and location afforded. For though the older Jay dealt in beer and rum, as well as in kerseys, mohairs, hats, gloves, and sugar and hams, he was reputed as a "gentleman of opulence and character," a zealous churchman, and advocate of schools and wider knowledge. Thus we have it that, after surviving an attack of sore throat, of which a younger sister died, and escaping a dreaded smallpox, which left his brother, Peter, Jr., and his sister, Nancy, blind, he was taught by his mother the "rudiments of English, and the Latin Grammar." Johnny had a grave disposition, and took to learning exceedingly well, so saith his father's diary, on his entering the grammar school at New Rochelle, at the age of eight.

French was usually spoken throughout New Rochelle, which, as the name suggests, was peopled chiefly by descendants of French refugees, and thus the young Jay learned early and easily the language which was to prove so useful to him during his then unanticipated career as a diplomat.

For three years Johnny remained at the grammar school, which was conducted by the Rev. Mr. Stoope, and was then taken home, and there prepared for college by a private tutor, Mr. George Murray. He entered King's (now Columbia) Col-

lege at the age of fourteen, having passed an examination that would do credit to many of that institution's modern graduates.

For admission he was required to read three of Tulley's orations, and six books of Virgil into English, and the first ten chapters of St. John's Gospel into Latin. A candidate for college who can do that successfully nowadays is considered a prodigy, and the graduate who can do it, a fit candidate for a lunatic asylum. But Jay found this knowledge useful, indeed indispensable in his career. There are such exceptions to the rule of to-day.



F Jay's college life but little is known. At that time the institution was under its first president, the learned and pious Dr. Samuel Johnson, who had been one of the first graduates of Yale College to desert Congregationalism for the English Church. Single-handed at the outstart, and then with a pair of assistants, Dr. Johnson set King's College agoing, and was just gaining some success, when our subject was enrolled; and we have it from the college president's own pen, that "he set himself at once, and of his own accord, to curing certain defects of utterance and rapid reading, making an enthusiastic study of English composition," which no doubt bore fruit in the graceful and easy, and oftentimes laconic style for which he was noted, and which in the first Continental Congress at once placed him in "the little aristocracy of talents and letters."

But in 1763 the old doctor resigned, through fear of smallpox, which had taken away his wife, was an epidemic in New York, and of which he was sore afraid; and he was succeeded as president by Dr. Mayles Cooper, "a wit and scholar," says Gulian Vanplank, "whose learning and accomplishments gave him personal popularity, and of course added authority to his opinions, which were the opinions and prejudices of the high-toned English University Tory of the Eighteenth Century." Under the tuition of Dr. Cooper, John Jay finished his college course. He was already in his senior year, and an incident that occurred shortly after the new president was installed will throw some light on how well Jay was by nature adapted to the course in life which he later chose to pursue.

One day a number of students in the College Hall began to break a table,—a typical senior trick. The doctor heard the noise, went in, and asked one student after another, "Did you break the table?" "Do you know who did?" All answered, "No," until John Jay was asked, and he was the last but one. To the first question Jay answered the same as the others, but to the second inquiry, his answer was, "Yes, sir." "Who was it?" asked the doctor. "I do not choose to tell," was the sturdy reply of the future Chief Justice, and the next and last boy of the class answered in the same manner. These two were then called before the faculty, where Jay argued his first case. Admitting all the facts, he contended ingeniously and reasonably enough that, "as information against fellow students was not required by the college statutes, they were not technically guilty of dis-

obedience in not informing; that such information was not customary with students, and in the absence of statute making it mandatory, there could be no offense." He admitted *ignorantia legis non excusat*, but in this case there was neither *legis scriptae* nor *legis non scriptae* on which a knowledge could be based. "Our fellow students," he said, "who answered 'no' to both questions are within the maxim *Ignorantia Facit Excusat*, it is true. Are we to be punished for entertaining a secret, and holding it sacred, which neither the custom of students nor the college statutes forbid?" But the professors, who thought themselves the injured parties, were also the judges, and were not to be convinced by any such ingenuity, hence Jay and his fellow criminal were rusticated only a short time before they were to graduate.

It appears, however, from the college records that Jay must have continued his studies at home, for his suspension over, he was enabled to return in time to pass an exceptional examination, and at the commencement held May 17, 1764, sixty-five years previous to the date of his death, he delivered a dissertation on "The Blessings of Peace," and received his bachelor's degree.

Twelve years later, at the outbreak of the Revolution, Dr. Mayles Cooper, the "wit and scholar," whose "opinions and prejudices" were of the "high-toned English University Tory," was forced to leap over the college fence to escape a mob of "Liberty Boys," eager for American independence, and determined to repeal the "authority" of "his opinions" by hurrying him away to the England that enjoyed his sympathies, and thus ended his

college presidency in a manner but little befitting a poet and Fellow of Oxford.

ABOUT that time the bar of the city of New York had a severe attack of supercilious fear that there was to be a great influx of applicants for admission, and to avoid it, the then practising lawyers agreed upon a resolution "to take no one as clerk who proposed to enter the profession." Accordingly Jay began to make preparations to start for England to get a professional education there, but an amendment to the aforesaid resolution was finally acceded to by the lawyers, in the proviso, that "no one shall be employed as clerk who proposes to enter the profession, except under such restrictions as will greatly impede the lower class of people from creeping in."

This was a happy ending of much anxiety for Mr. Peter Jay, and John at once entered the office of Benjamin Kissam, a barrister "eminent in the profession," by binding himself as an apprentice on the payment of £200, to serve for five years, "with the liberty to apply the last two years to the study of law, and to visit the sessions, with only occasional attendance at the office."

Printed blank forms, typewriting machines, stenographers, and such modern conveniences, were not known in the law offices of those days, and Jay's duties as a clerk were immensely laborious. Everything was written, and the drudgery of copying was oppressive. Even the argument

of questions of law before the Supreme Court was conducted in writing, in longhand, a system which, with all its bunglesomeness, nevertheless had its advantages for the law student, for what a man has to write down and copy, he usually remembers. The hand thus feeds the mind as well as the body.

The must of the Revolution was already fermenting, but at that time more as a matter of politics than of patriotism, both being apparently ignored by the lawyer and the student, except in so far as concerned their legal business. Thus, in April, 1766, Mr. Kissam proposed a "jaunt" to Philadelphia, if the news of the repeal of the Stamp Act did not arrive meantime; for, as he wrote, "On the repeal of the Stamp Act we shall doubtless have a luxuriant harvest of law, and I would not, after the long famine we have had, willingly miss reaping my share of the harvest."

But the Stamp Act was not thus repealed, and Kissam while absent wrote to inquire about the conduct of his office, to which Jay characteristically replied, as he expressed it, "Free enough, in all conscience." "A man's own evidence is not of much account in his own defense, I beg to remind you," he wrote his master, "hence if you mean to ask me how your clerk is acting, I know hardly how to answer. If I tell you I am all day in the office, and as attentive to your interests as I would be to my own, I suspect you would think it such an impeachment of my modesty as would not operate very powerfully in favor of my veracity. On the other hand, should I say to you that I am making hay while the sun shines, and say to my

soul, 'Soul, take thy rest, thy lord is journeying in a far country,' I should be much mistaken if you did not think the confession looked too honest to be true."

As this correspondence would indicate, Mr. Kissam, the eminent barrister, and Mr. Jay, though but twenty-one and only a clerk, were on terms of intimacy, such as permitted an occasional diversion to merriment. It was about this time, too, that the future peace envoy of the American Revolution, John Jay, by a diplomatic, though not insincere reply, got his father's leave to keep a horse.

"John, what do you want of a horse?" asked his father. "That I may have the means, sir, of visiting you frequently," was the diplomatic reply, and John, whom his father loved dearly, was soon sporting a fine horse—at his father's expense.

John Jay was admitted to the bar in 1768, and became almost immediately successful. At first, a temporary partnership was formed with Robert R. Livingston, under the firm name of Livingston & Jay, barristers, advocates, etc. Benjamin Kissam, when unable to attend to his own business, would often ask Jay to act for him, and a letter of his shows the nature of the cases: "One is about a horse race, in which I suppose there is some cheat; another is about an eloped wife; another appertains to horse flesh gone astray, and there is also one writ of inquiry."

The practise of the country lawyer then, as now, and the city of New York then was not as large as the Greater New York of to-day, consisted chiefly in making collections, settling line fence disputes, suing out writs of ejectment,—especially

for the young attorney whose practise was limited at the best. Only one cause of any consequence is mentioned in which Jay was engaged, namely, a contested election in Westchester County, in which the right of suffrage was discussed, and questions of evidence of more than usual intricacy arose. On this occasion Jay was opposed by his friend, Gouverneur Morris, and Jay won. In 1770, Jay speaks of going to Fairfield, to try two cases, and in 1774 he addressed a jury at Albany. His practise then was quite varied, though he was engaged in no great cases, like that of Zenger, involving principles of constitutional law, and establishing the reputation of victorious counsel, and he was at no time noted for brilliant or "magnetic" oratory. "All the causes you have hitherto tried," wrote Kissam about that time, "have been a kind of inspiration," which shows that they still remained close friends, though sometimes engaged on opposite sides. On one such occasion, Kissam, in a moment of embarrassment, complained that he had brought up a bird to pick out his own eyes. "Oh, no," was Jay's retort, "not to pick out, but to open your eyes."

Instead of New York being the financial center of the Western Hemisphere in those early times, it was the home of the "Moot Court," an idea originated by John Jay in November, 1770, and now in vogue in practically all the law schools of the country. This club met the first Friday of every month for the discussion of disputed points of law—but party politics were strictly forbidden. Unlike the modern Law School Moot Court, however, this club was composed of lawyers, and its deci-

sions on matters of practise are said to have been followed by the Superior Court in its sessions. Among its members we note the name of John Jay, first Chief Justice of the United States Supreme Court; Egbert Benson, Jay's college friend who with him said "yes," but wouldn't tell, and who in due time became Judge of the New York Supreme Court; Robert R. Livingston, Jr., son of Jay's law partner; James Daune, Jay's colleague in the Continental Congress, and first Mayor of New York after the Revolution; Peter Van Schaack, whom Jay, as chairman of the Council of Safety, was later to exile from the State for being a Tory, but who loved him to the end, and wrote a glowing epitaph upon him; and Gouverneur Morris, not yet possessed of that wooden leg which he later brandished with such patriotic effect in the face of a Paris mob; while among the older lawyers who attended now and then were William Smith, who later became Chief Justice of Canada, after having been confined at Livingston Manor by Jay's committee, and banished as a Tory sympathizer; Samuel Jones, not the preacher, but the Chief Justice whose office was to be the training school of De Witt Clinton; John Morin Scott, the popular orator of the "Liberty Boys;" and then, there was Benjamin Kissam, Jay's tutor, and William Livingston, his future father-in-law, the future Revolutionary Governor of New Jersey, and already well known for countless literary and political poems, essays, and letters.

On April 28, 1774, at patriotically named "Liberty Hall," in Elizabeth, New Jersey, John Jay was united in holy wedlock to the "beautiful Sarah

Livingston," youngest daughter of William Livingston, and in the notices of the wedding, Jay, young as he was, was described as an "eminent barrister," much after the fashion of the press of to-day, which refers to the newly married young lawyer as "a rising young attorney."

And thus endeth the first third of Jay's life, which naturally was divided into three thirds; but curiously, the second third — of twenty-eight years — was devoted almost wholly to public service, and the last third was spent in retirement. His day as a lawyer in practise is now quite done, the tide of the times having drawn him into the vortex of politics.



THE average human head, like an egg — or a crock of baughnaughclaughber — absorbs the flavor of its surroundings, and up to the beginning of Jay's public life there seems but little to indicate that his head was very far above the average. Thus we have it that "John Jay was a Whig." By family traditions he was a Whig; most of his associates had been Whigs, and now he was connected by marriage with the great Whig family of Livingstons, which had for generations contested the province with the Tory De Lanceys.

Notwithstanding his youth, this traditional Whig became one of the most active and influential spirits of the early Revolutionary period. In 1774, shortly after his marriage, he was sent as a delegate to the First Continental Congress, a distinction which must have been looked upon by the

new Mrs. Jay with considerable pride. That Congress assembled in Philadelphia, and there Jay found himself, with the single exception of Edward Rutledge, the youngest member of that august body. He possessed none of the headlong impetuosity or fiery zeal of Rutledge, however, or of Henry, or of Adams, and prudently abstained from any vain attempt to compete with these notorious orators; but it was John Jay who was the author of the "Address to the People of Great Britain," and he at once won world-wide renown by it,—a paper which drew forth encomiums even from the Earl of Chatham by its able and dignified statement of the rights of the colonists, and the glowing portrayal of the wrongs which they endured.

Most of the delegates of the First Continental Congress were conservative and loyal subjects to the British Crown, and Jay was the leader of this conservative element. Indeed, so conservative was he, that some thought to class him among the Tories. His position was that the safest and most dignified position for the Congress to take, would be that of a convention called to petition His Majesty the King for a redress of grievances. He advised deliberation and caution. "If we can get what we want,—our rights as British subjects,—let us remain true to the home-land across the sea," he said in one of his speeches, "and it is worth while to petition and try before radical measures are resorted to." And Jay's course was pursued. Otherwise, the "facts submitted to a candid world," as in the Declaration of Independence, sent forth two years later, could not have been followed by this sympathy-inspiring announcement:—

"In every stage of these oppressions we have petitioned for redress in the most humble terms: our repeated petitions have been answered by repeated injury. A prince whose character is thus marked by every act that may define a tyrant, is unfit to be the ruler of a free people."

Of Jay, then, as of every man in that day like him, it may be said, though in a different sense from that of the old Roman, that "by delay he created a nation," for at the time of the First Continental Congress, the colonies were, as yet, united neither in sentiment nor interests, and the parties, Whigs and Tories, Liberals and Conservatives, were, in the aggregate of wealth and influence, nearly evenly divided. By promoting petition after petition to the king, sometimes in terms of almost undignified conciliation, and with no effect, as in the Declaration of Independence set forth, a unity of sentiment was established, and a common cause made, in which all — worth mentioning — pledged their lives, their fortunes, and their sacred honors.

Jay knew that in union alone there is strength, and foresaw that with the colonists divided in sentiment and without common cause, a war for independence would be a miserable failure, with conditions worse than ever for their pains.

Jay also served as a member of the Committee of Correspondence, and is said to have written the reply to the Boston Address, in which the project of nonintercourse was opposed. He also wrote the Address to the People of Canada, and one to the Inhabitants of Ireland. He continued in Congress until May, 1776, when he was recalled to assist in framing a government for New York,

and thus narrowly missed the earthly immortality which glorifies the names of the signers of the Declaration of Independence,—a few years since proved to be, as one of our modern generals ascribed it, “a damned incendiary document” in the hands of the Filipinos.

But then the Filipinos never petitioned for redress of grievances, as our colonial fathers did. Indeed, they had no grievances to redress, had they only known it, but misinformed, they were right there, and ready to fight, just as so many erratics in the First Continental Congress were, only in the case of the Filipinos, there was no John Jay to counsel moderation, and no Dickinson to second the motion.



N Jay's return to New York, he drafted a Bill of Rights, and took a leading part in framing the Provincial Constitution; in fact, he is said to be the author of it, a document in many respects the same as the constitution of New York State to-day.

One of these respects is worthy of notice. It pertains to religious liberty. Read on: “The free toleration of religious profession and worship without diminution or preference shall forever be allowed within the State to all mankind.” This priceless heirloom of freedom of conscience was bequeathed to New York by New Netherlands, which, almost alone among the colonies, had never listened to the denunciations of fanaticism or lighted the fires of persecution.

In Jay, the author of it, the old Huguenot blood still run hotly with traditional memories of his great-grandfather, Pierre Jay, driven from La Rochelle; of his other great-grandfathers' families, the Bayards and Phillipses, seeking refuge in Holland and Bohemia from the strong arm of the Papacy, and he defended the proviso with all the zeal of an Ezra and the eloquence of a Nehemiah. For the power of the Church of Rome he knew and feared, and accordingly urged a further amendment, to "except Roman Catholics until they should abjure the authority of the Pope to absolve citizens from their allegiance, and to grant absolution."

It is needless to say that a fierce debate followed this proposition, for there were Catholics present, and they could point with some degree of scorn to the persecutions by the Church of England, of which Jay was a member; to how it had driven the Pilgrims hither, and how even the pious Pilgrims had been guilty of persecuting dissenters. The result was the adoption of a proviso, that the "liberty of conscience hereby granted shall not be so construed as to excuse licentiousness or justify practises which are inconsistent with the safety of the State."

But Jay was not satisfied with this, and when the question of naturalization came up, he renewed his fight, and secured the adoption of an amendment, sufficient for public safety, but less "strenuous," perhaps, than he desired; that before naturalization all persons shall "abjure and renounce all allegiance to all and every foreign king, prince, potentate, and State, in all matters ecclesiastical as well as civil."

This wording, perhaps, shows Jay's motives in the controversy, that it was not a religious but a political question; that it was not Romanism as a religion that he feared, but Romish imperialism in the affairs of state. For John Jay was not a bigot. So great was his sense of the diversity of opinion, both religious and political, that when it was moved to open the sessions of the First Continental Congress with prayer, he objected, though as devout a man as any present, "because," as John Adams has written, "we were so divided in religious sentiments." And, when the New York Provincial Congress, in later years, forwarded to him and his colleagues a "plan of conciliation," protesting, among other things, "against the indulgence and establishment of Popery (by the Quebec Act) all along their interior confines," Jay's answer was that they "thought best to make no reference to the religious article, preferring to bury all disputes on ecclesiastical points, which have for ages had no other tendencies than that of banishing peace and charity from the world."

In spite of Jay's caution, however, the First Continental Congress was opened with prayer. A chaplain was found whose prayers (though he afterward joined the Royalists, and was banished by Jay's Council of Safety) excited no dissension at the time.

As chairman of the Council of Safety, this worthy — or unworthy — chaplain was not the only man Jay countenanced should be sent abroad for colonial protection. Some of them were his very friends. Men who as Royalists continued, after the outbreak of the war, to advocate the same doc-

trines of conciliation as Jay himself had championed in the Continental Congress, were banished or imprisoned as traitors. Here Jay justified his conduct — clever politician that he was — by pointing out that things said in times of peace might have a different aspect when reuttered in time of war. "It is different than when we were all British subjects. The United States have declared their independence, and we are fighting England to maintain it. Should we tolerate her emissaries right here in our midst? Let those who favor the British take refuge in Britain. To us they are traitors. It is a military measure," he said.

But to return to the Provincial Constitution drafted by Jay for New York. Another item will bear special notice. It pertains to the qualification of voters. It was Jay's theory that all voters should be taxpayers; that "the people who own the country should run it." It is needless to say that the Constitution of York State does not recognize that feature in these piping times,— much to the chagrin, perhaps, of some streets in Jay's native city, the inhabitants of which would like to have it reasserted not only in the Constitution of New York, but of the United States as well.



IN September, 1776, John Jay was appointed Chief Justice of New York under the Constitution which he had championed. His court was merely the old provincial Supreme Court continued. The minutes of Jay's first term appear in the same old book as had been in use

by the Crown. There are a few blank leaves between the Crown records and the minutes under Jay, but aside from this there is nothing to indicate a change of government, other than the title of a criminal case in which "The People of the State of New York" appeared as plaintiff, instead of "Domino Rex." Here is part of an address delivered by Jay to the Grand Jury of Ulster County, which was for years afterward considered among the classics of the Revolution.

"It affords me, gentlemen," was the impressive opening, "very sensible pleasure to congratulate you on the dawn of that free, mild, and equal government which now begins to break and rise from amid those clouds of anarchy, confusion, and licentiousness which the arbitrary and violent conduct of Great Britain has spread, in greater or less degree, throughout this and the other American States. . . . Vice, ignorance, and want of vigilance will be the only enemies able to destroy it. Against these be forever jealous." And then follows this piece of wise philosophy:—

"Delay in punishing crime encourages the commission of crime. The more certain and speedy the punishment, the fewer will be the objects. . . . 'The law's delays' cloak as many sins in society and politics as charity is said to do in religion." At another time, he says:—

"To tax a faculty is to tolerate it, vice not being in its nature subject to taxation, except in the form of an indulgence to commit sin, and this State has no such indulgences for sale. By the principles of the Constitution, the vending of indulgences by ecclesiastical authority is uneffective 'to excuse

licentiousness or justify practises inconsistent with the safety of the State,' while, on the other hand, a license by the State legalizes what it allows, and makes it no longer a wrong but a virtue in the eyes of the law. . . . A wrong, therefore, which the Legislature has not seen fit to prohibit, is not a subject for human punishment, however much it may be to divine vengeance. No citizen is liable to be punished by the State but such as have violated the laws of the State."

Jay, in his address, was discussing an income-tax, and holding that "the public good requires that commerce and manufactures be encouraged," except when "taking advantage of the necessities of their country, they have, in prosecuting their private gain, amassed large sums of money to the great prejudice of the public," to avoid which, "laws should be passed which are absolutely prohibitory, rather than to subject them to penalties under the specious name of tax, and thus, in effect, grant them an indulgence."

It would seem from this that there was some fear of ours becoming a trust-ridden country, even in those days, and with New York the seat of the evolution.



FOR several years the boundaries between New York, New Hampshire, and Massachusetts had been a source of controversy and confusion. The Declaration of Independence was utilized by Ethan Allen and others of the disputed territory as a good opportunity to declare their independence, and set up a new

province, which they began to call Vermont. Accordingly, Vermont began to knock at the door of the Continental Congress for recognition as one of the "free and independent States" referred to in the general declaration of 1776. This finally induced the New York Legislature to resolve that there existed "a special case," in the sense of the Constitution, that would justify the appointment of Jay to Congress without vacating his seat on the bench. In December, 1778, he was accordingly returned to the scene of his old labors, with the special mission of urging Congress to settle the territorial claims.

On arriving at Philadelphia, Jay found that his "special mission" was likely to keep him there for some considerable time, whereupon he resigned the Chief Justiceship, that the courts of his State "might not longer be kept inoperative."

It soon happened, too, that Henry Laurens, president of Congress, resigned, and Jay was elected to take his place, notwithstanding that his "special mission" was to settle the question of Vermont. He finally moved, and carried, resolutions to submit the question to arbitration, thus recognizing the new claimant explicitly, a position which he justified with characteristic common sense, as follows:—

"In my opinion, it is much better for New York to gain a permanent peace with her neighbors by submitting to these inconveniences, than by impolitic adherence to strict rights, and the rigid observance of the dictates of dignity and pride, to remain exposed to perpetual dissensions and encroachments."

Thus we find John Jay an early advocate of arbitration, but Congress had no power to enforce an award of the arbitrators, and the dispute remained open until after the adoption of the Federal Constitution, when it was settled for all time by the transfer of \$30,000 from the treasury of Vermont to the treasury of New York,—a finale which Jay considered an “ignominious outrage,” and it was, against the people of Vermont.



AS president of Congress, Jay proved himself an able parliamentarian, and a man of executive force, winning at once the admiration and respect of all the Congressmen. Indeed, their respect for him seems to have rather exceeded his respect for them, for some thirty years afterward, when Gouverneur Morris visited Jay at Bedford, he one day ejaculated, through clouds of smoke, “Jay, what a set of damned scoundrels we had in that second Congress!” And Jay answered, “Yes, that we had.” And then, knocking the ashes from his pipe, he added, “There was as much intrigue in that State House as in the Vatican, and as little secrecy as in a boarding school—,” but there Morris intervened, “My pipe has gone out, can you give me a light?”

It was while Jay was president of Congress that such grave anxiety arose over the condition of the currency. “Our money,” wrote Robert R. Livingston to Jay, “is so much depreciated as hardly to be current, and, as a necessary consequence of this, our expenses have increased beyond

conception. According to a calculation I have made, it costs as much to maintain an army for two months now as it did to maintain it for the whole year of 1776. It is absolutely necessary that we should get out of this war soon." And, accordingly, it became one of Jay's first duties to write a letter to the States explaining the action of Congress in limiting the issue of paper money, and calling on them for funds to meet current expenses. If this letter hardly showed a thorough knowledge of the principles of finance, it must not be forgotten that the country in those days was not as well blessed with Gages and Goulds, Shermans and Rockefellers, Shaws and Morgans, Bryans and Clevelands, as in more modern years. Jay was as well supplied with such knowledge as any statesman of those times, and the letter at least answered the purpose of the moment. It stated simply the causes of depreciation, which in this case was held to be purely "artificial," or due to a lack of confidence in the government, and not "natural," due to excessive issue. Then the letter aimed to restore public confidence by affirming the honest intentions of Congress to fulfill their engagements, and proving their ability to do so by reference to the enormous undeveloped wealth which the States already possessed, and the indefinite increase of population that would come from immigration as soon as the war was won.

This optimistic note to the States served a goodly purpose, restoring confidence in the government to a considerable degree, and it also proved the fallacy, to a like degree, of Jay's financial contention. But "a bankrupt in need of money can

not afford to be logical," and an appeal to an optimistic patriotism was then the only resource. It did not cause the currency to appreciate, nor even stop its further depreciation, for it is now easy to see how the amount of paper then issued was far in excess of what could be maintained at par in the ordinary course of business, yet it brought some assistance from the States, and that was the main purpose for which the letters were sent.

On October 1, 1779, owing to the same financial difficulty, Jay resigned his seat in Congress, which was in the president's chair, and sixteen days later set sail for Spain to negotiate a loan of two millions of dollars with which to carry on the war, and to negotiate a treaty reserving to the United States the freedom of the Mississippi.



JAY'S experiences with and treatment by the haughty and arrogant Court of Charles III of Spain will hardly stand recital. To recount them would simply be to add so much to the already heroic fame of Admirals Dewey and Schley for wiping the Spanish navy off the face of the earth — or sea. It would simply be to add so much to our already enormous pride in having been the main force in banishing Spanish power from the Western hemisphere. "'Vengeance is mine, saith the Lord, I will repay,'" Jay recited to himself, when he found himself worsted, and had learned the whys and wherefores; and if it was possible for his illustrious spirit to return to earthly scenes, and view the progress of the Spanish-Amer-

ican War, it must have been gratifying to him that Providence was employing the nation he had helped to found, in keeping that threatening promise, and to such a glorious end.

At Madrid, Jay received no official recognition, and for nearly three years wrestled with the Spanish Court in his diplomatic way, but to no effect, save to the extent of \$150,000, which he confessed to getting by "acting with exquisite duplicity — a conduct which" he detested "as immoral, and" disproved "as impolitic." But the country at that time was in need of money, and Jay was "thankful for small favors," he said.

It must have been a happy day for him when, in April, 1782, he received this message from Benjamin Franklin, the United States Minister in France: —

"You are greatly wanted. Messengers begin to come and go, and there is much talk of a treaty being proposed; but I can neither make nor agree to propositions of peace without the assistance of my colleagues. . . . You would be of infinite service pending the arrival of the other commissioners."

Without delay, Jay shook from his feet the unfriendly dust of Madrid, and started for Paris.



JOHN JAY'S skill in negotiating the treaty of peace with Great Britain is universally recognized, Henry Cabot Lodge and Dr. Edward Everett Hale to the contrary notwithstanding. Assisted by John Adams, even Franklin was finally induced to concur with him in

disregarding the instructions of Congress to act in concert with our ally, the King of France, because he believed Vergennes, the French Minister, was playing a double part, injurious to the interests of the people of the United States.

During Jay's ministry to Spain, and after his arrival in Paris, things had transpired which to his mind appeared that France was to some extent responsible for the treatment he had received in Madrid, and his inability to negotiate a treaty, or the desired loan. He had come to the conclusion that France, while pretending to be our friend, and indeed assisting us with men and money, had no desire to assist in effecting American independence, but only to aid the colonies in prolonging a war with Great Britain which she (France) could use for her own selfish ends. Spain had a similar end in view, Jay divined, and France encouraged her in it, and indeed it was learned later that a secret treaty had been entered into between those countries under which their respective interests were to be guarded by each.

When the British commissioner arrived at Paris (Oswald was his name), Jay, lawyer-like, observed that he had come empowered "to treat and conclude peace with the commissioners of the said colonies or plantations," etc., rather than with the commissioners of the United States of America, and Jay, therefore, refused to grant him official recognition. "These ancient colonies and plantations," he remarked rather laconically, "have declared their independence and maintained it for years, even against their mother country, as the United States of America. We can treat for peace

with no one whose commission does not recognize the independence of our country."

We quote in part from Mr. Oswald's journal: —

"Jay is a man of good sense, of frank, easy, and polite manners. He read over the copy of the commission, . . . and then said: By the quotation from the Act of Parliament, he supposed it meant that independence was to be treated upon, and was to be granted, perhaps, as a price of peace. To this he objected, that it ought to be no part of the treaty; that independence should have been expressly granted by the Act, and an order for all troops to be withdrawn should be issued, previous to any proposal for a treaty. As this was not done, the king, he said, ought to do it by proclamation. . . . He spoke with such freedom of expression and disapprobation of our conduct at home and abroad respecting America," concluded Oswald, "as shows we have little to expect from him in the way of indulgence. . . . And I may venture to say that, although he has lived until now as an English subject, though he has never been in England, he may be supposed (by anything I could conceive) as much alienated from any particular regard for England as if he had never heard of it in his life."

Then, after mentioning "many things of a retrospective kind," Jay added that "the great point was to make a peace that would be lasting." "What security," Oswald asked, "could be given for a continuance of peace save a treaty, which, like the Treaty of Paris, was likely to prove very inadequate security." Jay replied, "I would not give a farthing for any parchment security what-

ever. They have never signified anything since the world began, when any prince or state on either side found it convenient to break through them. But the peace I mean is such, or so to be settled, that it will not be to the interest of either party to violate it."

"As to France," Oswald writes elsewhere, "he (Jay) said the Americans could make no treaty but in concurrence with the English settlement with France; that the independence of America was not a sufficient indemnity to France, and if granted as such, would put them under a greater obligation to France than they inclined to, as if to her alone they were indebted for their independence. The treaty of alliance with France must be fulfilled, he said, for they were a young Republic just come into the world, and if they were to forfeit their character at the outset, they would never be trusted again, and should become a proverb among mankind."

"Upon my saying," wrote Oswald, "how hard it was that France should pretend to saddle us with her private engagement with Spain, he (Jay) replied: 'We will allow no such thing. For we shall say to France: The agreement we have made with you we shall faithfully perform; but if you have entered into any separate measures with other people not included in that agreement, and will load the negotiations with their demands, we shall give ourselves no concern about them.'"

Jay and Franklin consulted, by appointment, with de Vergennes, to whom Franklin had sent a copy of the commission. De Vergennes advised them to "proceed under it, as soon as the original

should arrive." Jay observed that "it would be descending from the ground of independence to treat under the description of colonies," by which phrase the States were described in the commission. De Vergennes replied that "an acknowledgment of independence, instead of preceding, must, in the natural course of things, be the effect of the treaty, and that it would not be reasonable to expect the effect before the cause." On the whole, the French court considered that "the American ministers should accept the commission on condition that England would accept their own commissions as made by Congress."

Jay's theory of de Vergennes' motives he explained fully to Franklin. He thought that the French minister wished to postpone the acknowledgment until the objects of Spain had been secured, "because," he said in a letter to R. R. Livingston, "if we once found ourselves standing on our own legs, our independence acknowledged, and all our other terms ready to be granted, we might not think it our duty to continue in the war for the attainment of Spanish objects. I could not otherwise account for the minister's advising us to act in a manner inconsistent with our dignity, and for reasons which he himself had too much understanding not to see the fallacy of. The Doctor imputed this conduct to the moderation of the minister, and to his desire of removing every obstacle to speedy negotiation for peace. He observed that this Court had hitherto treated us very fairly, and that suspicions to their disadvantage should not be readily entertained. . . . He also mentioned our instructions as further reasons for our acquiescence in the advice and opinions of the minister."

Jay, indeed, had divined, with an accuracy hard to surpass, the fears of the Court of Spain, which, by the treaty of Aranjuez, Vergennes was compelled to regard.

"Would you break your instructions?" Franklin asked of Jay one day. "Yes," replied Jay, taking his pipe from his mouth, "as I break this pipe, which the doctors say is injurious, same as the instructions of Congress," and so saying, he threw the fragments into the fire.

Franklin, however, was unconvinced by Jay's reasoning, for on one Sunday morning he told Oswald that "'Mr. Jay was a lawyer, and might possibly think of things that did not occur to those who were not lawyers.' And he at last spoke as though he did not see much difference; but still used such a mode of expression that he (Oswald) could not positively say that he would not insist on Mr. Jay's proposition, or some previous or separate acknowledgment."

Jay also prepared a letter explaining the attitude of the commissioners. "If Parliament meant to enable the king to conclude a peace with us on terms of independence, they necessarily meant to enable him to do it in a manner compatible with his dignity, and consequently that he should previously regard us in a point of view that would render it proper for him to negotiate with us. As to referring an acknowledgment of our independence to the first article of a treaty, permit us to remark that this implies that we are not to be considered in that light until after the conclusion of the treaty, and our acquiescing would be to admit the propriety of our being considered in another

light during that interval. It is to be wished that His Majesty will not permit an obstacle so very unimportant to Great Britain, but so essential and indispensable with respect to us, to delay the re-establishment of peace."

This letter was considered too positive by Franklin, who, moreover, as Jay wrote to Livingston, "seemed to be much perplexed and fettered by our instructions to be guided by the advice of this court. Neither of these considerations had weight with me; for as to the first, I could not conceive of any event which would render it proper, and therefore possible, for America to treat in any other character than as an independent nation; and as to the second, I could not believe that Congress intended we should follow any advice which might be repugnant to their dignity and interest."


Meanwhile, John Adams was hurrying to Paris at Jay's summons, and arriving, took a firm position in support of this policy. To Adams is due a portion of the credit of winning Franklin to taking the same stand. "I told him without reserve," wrote Adams, "my opinion of the policy of this court, and of the principle, wisdom, and firmness with which Mr. Jay had conducted the negotiations in his sickness and my absence, and that I was determined to support Mr. Jay to the utmost of my powers in the pursuit of the same policy. The Doctor heard me patiently, but said nothing. At the first conference we had afterwards with Mr. Oswald, in considering one point and another, Dr. Franklin turned to Mr. Jay and said, 'I am of your opinion, and will go on with these gentlemen in this business without consulting France or any other Court.'"

This accomplished, and the British commissioner having shown that he had side authority to recognize the "independence of the colonies" in a preliminary article, if absolutely necessary, a draft of such a recognition was drawn by Mr. Jay, which, agreed to by all the parties, progress in the direction of a treaty of peace was decidedly rapid. To persons not versed in public affairs, the wording of a commission may seem of minor importance, but whether Oswald was to treat with the colonies as such, or with the United States, was of considerable difference in this instance, for in the one case, independence still remained as something to be bargained for, and the States were technically colonies of Great Britain until the treaty was signed, in which case they would be precluded from making certain claims which as independent States would be their privilege and their right.

The "United States" treating with Great Britain was on an entirely different basis than the "colonies" would have been. The two powers were on an equal footing. The only question was how to make a permanent peace between them. "The colonial claims," wrote Adams in later years, "well founded or not, became important when pressed by an independent country, and instead of a treaty of more or less grudging concession from a superior power to its revolting colonists, the treaty became one of territorial partition between equals seeking a permanent basis of conciliation. Indeed, the preliminary grant of independence may be said to have carried with it a grant of the fisheries and of the western territory, which as colonies we would have had no right to claim." And the credit is due to John Jay.

The terms of that treaty are well known. The United States gained more than Congress had ventured to propose, or even hope for. The French Minister, de Vergennes, was dumbfounded. England explained herself by saying she did not consider the colonies or their claims worth bickering with. We hope she has since discovered her mistake, for she gave up some very, very valuable territory,—let the fisheries be hanged.

“I will return home to become and remain a private citizen and a lawyer,” Jay wrote to a friend, and on May 16, 1784, he left Paris with his family, and took ship for New York.

N returning to New York, after an absence of some five years, Jay was welcomed by the city fathers with an address, and the freedom of the city in a gold box, “as a pledge of their affection and sincere wishes for his happiness.” But instead of becoming “a simple citizen,” as he had determined, with nothing else to do but to “practise in the legal profession,” he found that Congress had two months before appointed him Secretary for Foreign Affairs.

Jay was reluctant to accept this position without the privilege of appointing his own clerks, a power which Congress had theretofore reserved to itself. But when Congress convened, the matter of appointing his subordinates was yielded, and the Secretaryship was assumed by Mr. Jay in due course.

Up to this time the Secretary of Foreign Affairs had served for but little more than a mere clerk of

Congress, but with the Treaty of Peace accomplished, and independence won, it in a short time became the first office in importance under the Confederacy, for through it was conducted all the correspondence between the Federal Government and the several States, as well as with foreign nations. In this capacity, Jay served until the adoption of the Federal Constitution and the seating of the first President, when, as before stated, Washington offered him his choice of the Federal offices, and he chose the Chief Justiceship.

The part played by John Jay in bringing about the adoption of the Federal Constitution was as important as any achievement of his career.

According to Pellew, "the national life was not secured by the Treaty of Peace, which only gave an opportunity for it; and the time between 1783 and the adoption of the Constitution of 1788 was 'the most critical period of the country's history.' The people were restless under the depression of trade and the depreciated currency; rioting threatened in many States, and in Massachusetts became rebellion."

"I am uneasy and apprehensive," wrote Jay to Washington, "more so than during the war. Then we had a fixed object, and though the means and time of obtaining it were often problematical, yet I did firmly believe that we should ultimately succeed, because I did firmly believe that justice was with us." The liberty so dearly won seemed about to be lost forever in the imminent anarchy. "If faction should long bear down law and government," were his gloomy words to Adams, "tyranny may raise its head, and the more sober part of the people may even think of a king."

The reasons for the failure of the Confederation were obvious, and Jay laid his finger on those that were fundamental: "To vest legislative, judicial, and executive powers in one and the same body of men, and that, too, in a body daily changing its members, can never be wise. In my opinion, those three great departments of sovereignty should be forever separated, and so distributed as to serve as checks on each other." This principle became the cornerstone of the Federal Constitution. Government by committees was another chief cause of executive procrastination and inconsistency. "In my opinion," Jay wrote to M. Grand in Paris, "one superintendent or commissioner of the treasury is preferable to any greater number of them. Indeed, I would rather have each department under the direction of one able man than of twenty able ones;" and modern publicists have reached the same conclusion. Finally, coercive power in the Federal government was essential. "A mere government of reason and persuasion," was Jay's unwilling testimony, "is little adapted to the actual state of human nature," as recorded in his letters to Thomas Jefferson.

When a loan was proposed, necessary as money was, Jay was obliged to say: "Congress can make no certain dependence on the States for any specific sums, to be required and paid at any given periods, and consequently is not in a capacity safely to pledge its honor and faith as a borrower." This analysis of the weakness of the government he embodied in an Address to the People of the State: "They (the Congress), may make war, but are not empowered to raise men or money to carry it on.

They may make peace, but without power to see the terms of it observed. They may form alliances, but without ability to comply with the stipulations on their part. They may enter into treaties of commerce, but without power to enforce them at home or abroad. They may borrow money, but without having the means of payment. They may partly regulate commerce, but without authority to enforce their ordinances. They may appoint ministers and other officers of trust, but without power to try or punish them for misdemeanors. They may resolve, but can not execute, either with dispatch or with secrecy. In short, they may consult, and deliberate, and recommend, and make requisitions, and they who please may regard them." This was under the Confederacy.

Jay's remedy lay in securing a more centralized form of government. "Father was in this sense a Federalist from the beginning," Jay's son William tells us. "A strong Federal union he considered the real aim and spirit of the Revolution. What was new was rather the doctrine of extreme State Rights of the so-called anti-Federalists." "It has, until lately, been a received and uncontradicted opinion," Jay stated in the "Federalist," "that the prosperity of the people of America depended on their continuing firmly united; and the wishes, prayers, and efforts of our best citizens have been constantly directed to that object. But politicians may appear who insist that this opinion is erroneous, and that instead of looking for safety and happiness in union, we ought to seek it in the division of the States into distinct sovereignties. However extraordinary this new doctrine may seem, it nevertheless has its advocates."

Even from France Jay had urged the necessity of centralization: "I am perfectly convinced that no time is to be lost in raising and maintaining a national spirit in America. Power to govern the Confederacy as to all general purpose should be granted and exercised." "I am convinced," he wrote to John Adams, "that a national government as strong as may be compatible with liberty is necessary to give us national security or respectability." "It is my first wish," he wrote to John Lowell, "to see the United States assume and merit the character of one great nation, whose territory is divided into different States merely for more convenient government and the more easy and prompt administration of justice, just as our several States are divided into counties and townships for the like purposes."

When, therefore, in 1787, the question was put, "What is to be done?" and an answer was demanded, Jay could write to Washington with some definiteness: "To increase the power of Congress would be ineffectual, for the same reasons that always make a large committee a dilatory and inconsistent executive." He declared: "Let Congress legislate, let others execute, let others judge. Shall we have a king? Not, in my opinion, while other expedients remain untried. Might we not have a Governor-General, limited in his prerogatives and duration? Might not Congress be divided into an upper and lower house, the former appointed for life, and the latter annually, and let the Governor-General (to preserve the balance), with the advice of a council formed for that purpose, of the great judicial officers, have a negative on their

acts? . . . What powers should be granted to the government, so constituted? . . . I think the more, the better; the States retaining only so much as may be necessary for domestic purposes, and all their principal officers, civil and military, being commissioned and removable by the national government."

Jay was not a member of the Constitutional Convention, which was elected on recommendation of Congress. His appointment was urged by Alexander Hamilton, and was carried in the Assembly, but the Senate defeated the project on the ground of his "well-known ultra-Federal ideas." As a result, New York came near not being represented at all, two of the three delegates leaving the convention, because, as one of them, Lansing, declared, the Legislature would never have sent them, had it supposed the powers of the Convention extended "to the formation of a national government, to the extinguishment of their independency."

But Jay was not idle. With the co-operation of Hamilton and Madison, he at once started the "Federalist," which they ran serially for a time in the New York journals. Jay was the author of the second, third, fourth, fifth, and sixth numbers, and "no Constitution," according to Chancellor Kent, "ever received any more masterly and successful vindication." Section by section, it took up that instrument, and when the time for the ratification of the Constitution came, the people of New York knew about what it meant. They were made intelligent with what the regime under the new government would be, with Jay's and Madison's and Hamilton's central idea always in the foreground. "In-

dependent and probably discordant republics, one inclining to Britain, another to France, and a third to Spain, and perhaps played off against each other by the three, all would fall an easy prey to foreign invasion and encroachment;" a sentiment quite similar to Lincoln's favorite doctrine, that "a house divided against itself can not stand;" or, as John Jay once expressed it, "How soon would dearly bought experience proclaim, that when a nation or a family divides, it never fails to be against themselves." The ratification of the Constitution was therefore urged for protection against foreign invasion. "Union alone is not sufficient," was Jay's reluctant admission. "To union must be added strength." The treaty-making power, as vested in the Senate, was a great hobby of the "Federalist." "With separate States making separate and perhaps inconsistent treaties with foreign nations, will not disunion certainly tend to encourage war? And in cases of disputes between the States, who shall settle terms of peace? What umpire shall decide between them, and who shall compel acquiescence? By a national union unreasonable causes of war are less likely to arise; just causes will seldom be incurred, and it will secure the safety of the States, by placing them in a situation not to invite hostility."

Jay also took it upon himself to write an anonymous Address to the People of the State urging ratification. According to Pellew, this "simply written, logical pamphlet had an almost astonishing effect in converting anti-Federalists to a knowledge and belief that the new Constitution was their only salvation." The author soon betrayed his well-

known style, however, and Franklin urged him to sign his name to it, "to give additional weight at this awful crisis," but Jay replied, that "if the reasoning of the pamphlet is sound, it will have its effect on candid and discerning minds, and if weak and inconclusive, my name will not render it otherwise." "Our affairs are daily going from bad to worse," the address ran, "our distresses are accumulating like compound interest. . . . Let it be admitted that this plan, like everything else devised by man, has its imperfections; that it does not please everybody is certain, and there is little reason to expect one that will. It is a question of grave moment to you, whether the probability of your being able to obtain a better is such as to render it prudent and advisable to reject this, and run the risque. . . . If this plan is rejected, and a new one fails or is long delayed, as it must be, all government meantime coming to a stop, every band of union will be severed. Then every State would be a little nation, jealous of its neighbors, and anxious to strengthen itself by foreign alliances against its former friends. What in such an event would be your particular case?"

Finally the convention for ratification was at hand, and after forty days of "an ordeal torture," to quote an eye-witness, "the task was accomplished by a majority of three votes," but not without a number of proposed amendments, nor until a sufficient number of other States had ratified to make the new government a reality. The laurels of the victory were borne by Hamilton, but the work of Jay was such that Washington wrote from Mount Vernon: "With peculiar pleasure I now congratu-

late you on the success of your labors to obtain an unconditional ratification." And John Adams, writing to James Lloyd, said: "I forebore to mention one of more importance than any of the rest, indeed of almost as much weight as all the rest. It is Mr. Jay. That gentleman has had as much influence in the preparatory measures, in digesting the Constitution, and obtaining its adoption, as any man in the nation."



JAY closed his duties as Secretary of Foreign Affairs under the Confederation by officially handing over the affairs of the government to George Washington, first President under the Constitution. The duties that were previously his were then assumed by Thomas Jefferson, Washington's choice for Secretary of State. But Jay continued to act as one of Washington's confidential advisors, though in an unofficial capacity, until the Federal Judiciary Act was passed, whereupon he was at once appointed Chief Justice. In this capacity he served until 1795, when he resigned to become Governor of New York.

The causes brought before him as Chief Justice were, perhaps, not of a character to fully test his professional ability, though Wharton, in his "State Trials," speaks of his "sound, wary, and experienced judgment," and we have it from Story's "Commentaries on the Constitution," that "he was equally distinguished as a revolutionary statesman and a jurist." With one exception, his decisions are preserved only in the brief and dry

minutes of the clerk. There was no such system of reporting then as now, and as to precedents there were practically none to follow. The Constitution was his authority, but it had never been judicially construed. The Court had to claim a dignity and win a respect inherited by the other courts, for this one was an entirely new creation. For every other provision of the Constitution there was some precedent either in the theory or practise of the English Constitution, or in the institutions of some colony or province; but the Supreme Court, at least in respect to its original jurisdiction, was an entirely unprecedented result of the requirements of the new system of government, with its complex correlation of national and State sovereignties. Its position as interpreter and guardian of the Constitution, as the conservator of the republic, with equal and exact justice to all, depended upon the personal respectability and wisdom of the members of the bench, for its supreme power was almost that of a monarch, to rule and overrule the Acts of Congress, and from it there lay no appeal except to the bar of humanity. Jay doubtless had this in mind when he chose the Chief Justiceship, for he believed in himself, and it was with exquisite care for the rights and privileges and the best interests of all that he managed to determine for all time these three important constitutional items: the dignity of the Court was vindicated from encroachment by the Federal executive and Legislative departments; its jurisdiction was established over the State governments; and incidentally, Jay announced and determined that foreign policy of the United States which has been accepted and followed from that day to this.

Precedents were established on these three points in the following manner: In April, 1790, the Circuit Court for the District of New York, with Jay presiding, agreed unanimously to a protest against an Act of Congress providing that applications for invalid pensions should be passed on by the judges of the Supreme Court in their respective circuits. The protest declared that Congress could not assign to the judiciary "any duties but such as are properly judicial, and to be performed in a judicial manner; that the duties assigned to the Circuit Courts by this act are not of that description, inasmuch as it subjects the decisions of these Courts, made pursuant to those duties, first to the consideration and suspension of the Secretary of War, and then to the revision of the Legislature; whereas, by the Constitution, neither the Secretary of War, nor any other executive officer, nor even the Legislature, is authorized to sit as a Court of Errors on the judicial acts or opinions of this Court." Accordingly, when the question came before the court on a motion for mandamus in Hayburn's case, before a decision was given, the obnoxious act was repealed. Practically the Court had declared for the first time an Act of Congress unconstitutional.

The question of the conflicting sovereignties of the States and the nation was gradually brought to an issue through several suits being brought by individual States against citizens of other States, but the great question of the suability of a State remained unargued till the case of *Chisolm*, executor, vs. the State of Georgia, came to a hearing. The State refused to appear except to demur to the jurisdiction of the Court. The Chief Justice,

in his opinion, began by asserting that the States had never possessed an independent sovereignty. Before the Revolution "all the people of the country were subjects to the King of Great Britain. They were in strict sense fellow subjects, and in a variety of respects one people," he said. In the establishment of the Constitution, "we see the people acting as sovereigns of the whole country; and, in the language of sovereignty, establishing a Constitution by which it was their will that the State governments should be bound, and to which the State government should be made to conform. The sovereignty of a nation is in the people of the nation, and the residuary sovereignty of each State is in the people of each State." As one State may sue another State, "suability and State sovereignty are not incompatible." Cases "in which a State shall be a party" are by the Constitution within the jurisdiction of the Supreme Court. "Did it mean here party-plaintiff? If that only were meant, it would have been easy to find words to express it." The Court accordingly gave judgment against the State by default. The Legislature of Georgia passed acts condemning to death any one who should attempt to serve the process of execution. But judgment was never executed, for the next year an amendment to the Constitution was passed to counteract the effect of the decision. "Jay's logic, however, remained uncontroverted. It established the Court as the supreme interpreter of the Constitution, and his words," according to Pellew, "were long cited as disproving the extreme theory of State Rights," and "to determine the political duty of the citizen, in a crisis like that of 1861." It laid

down the lines, indeed, that Marshall followed in his famous series of Federal decisions, culminating in *McCulloch vs. Maryland*: "The government proceeds directly from the people, is ordained and established in the name of the people." "After this clear and authoritative declaration of national supremacy," says Judge Cooley, "the power of a court to summon a State before it, at the suit of an individual, might be taken away by the amendment of the Constitution — as was in fact done — without impairing the general symmetry of the Federal structure, or inflicting upon it any irremediable injury. The Union could scarcely have had a valuable existence had it been judicially determined that powers of sovereignty were exclusively in the States or in the people of the States severally. . . . The doctrine of an indissoluble Union, though not in terms declared, is nevertheless in its element at least contained in the decision. The qualified sovereignty, national and State, the subordination of State to nation, the position of a citizen as at once a necessary component part of the Federal and of the State system, are all exhibited. It must logically follow that a nation, as a sovereignty, is possessed of all those powers of independent action and self-protection, which the successors of Jay subsequently demonstrated were by implication conferred upon it."

In the spring of 1793, before Chief Justice Jay and Judges Griffin and Iredell, at Richmond, Patrick Henry made his famous argument in the second trial of *Ware's Executors vs. Hylton*, on the question whether British creditors could recover against Virginia debtors by virtue of the Treaty

of Peace, in spite of an Act of Virginia to the contrary. John Marshall, future Chief Justice, was Jay's colleague. At the final decision Jay was not present, though doubtless he would have concurred in the judgment of the Court in favor of the creditors, expanding from a statement of the contractual liability of an individual, to an assertion that the treaty obligations of a nation were paramount to the laws of individual States. Happy conclusion!

At the outbreak of the French Revolution, sentiment was divided as to what position the government should take on the subject of neutrality. The Federalists, under leadership of Washington and Hamilton, stood for "impartiality," fearing to use the word "neutral" because of its double meaning at the time. The anti-Federalists, or Republicans, under the leadership of Jefferson, were in favor of recognizing the belligerents and giving them aid.

"The duty and interest of the United States," ran the President's proclamation, "require that they should, with sincerity and good faith, adopt and pursue a conduct friendly and impartial towards the belligerent powers. I have, therefore, thought fit . . . to exhort and warn citizens of the United States carefully to avoid all acts and proceedings whatsoever, which may in any manner tend to contravene such disposition," but Washington's proclamation would have been a dead letter, signifying nothing, unless its principles had been sustained by the courts. It fell to Jay to place it upon a legal basis, holding: "International has precedence both of Federal and of municipal law, unless in the exceptional case where Federal law has deliberately departed from it." In his charge to a grand jury

at Richmond, Virginia, May 22, 1793, the Chief Justice said: "You will recollect that the laws of nations make part of the laws of this, and of every civilized nation. They consist of those rules for regulating the conduct of nations towards each other, which, resulting from right reason, receive their obligations from that principle and from general assent and practise. To this head also belong those rules or laws which, by agreement, become established between nations. . . . We are now a nation, and it equally becomes us to perform our duties as to assert our rights;" and he concluded accordingly that "the United States are in a state of neutrality relative to all the powers at war; . . . that, therefore, they who commit, aid, or abet hostilities against those powers, or either of them, offend against the laws of the United States, and ought to be punished."

One Gideon Henfield, a citizen of the United States, who had served as officer on a French privateer which brought a British vessel as a prize into Philadelphia, was accordingly indicted, though no jury could be found to convict him. The importance of the charge, however, was made manifest, declaring as it did, in the face of popular prejudice, "that violations of neutrality were criminally indictable at common law, and that the proclamation of the President was simply declaratory of law already in existence." "International law is part of the common law; by international law neutrality is presumed to exist till a tacit or public declaration of war; and a neutral, except in so far as stipulated by treaty, must grant aid, neither by arms nor men to a belligerent," is quoted from Jay, in "Levi's

International Law," and by the Treaty with France, no such stipulation was expressed; wherefore, says Chancellor Kent, in opening his Commentaries, "in becoming a nation, the United States became amenable to that system of rules which reason, morality, and custom have established among the civilized nations of Europe as their public law."

Jay's charge to the Richmond grand jury was printed by the government for distribution abroad, in order to explain the position of the Administration, while the Democrats, with conscious or unconscious misapprehension, demanded loudly, "What law has been offended, and under what was the indictment supported? . . . Were they to be punished for violating a proclamation which had not been published when the offense was committed, if, indeed, it could be termed an offense to engage with France, combating for liberty against the combined despots of Europe?" Bow-wow!

These are about all the judicial utterances of Chief Justice John Jay that are preserved in legal history as of any considerable importance. And, notwithstanding the fact that, unlike any of his successors, he was obliged to advance these opinions without the authority of precedent in American law, they certainly speak well for his good sense and judicial wisdom. For, let it be remembered, that at first sittings of Jay's court there were not only no precedents for himself and his associates to follow, but there were no litigants to apply them to. At the first sitting, they were obliged to adjourn for a day for lack of a quorum. The next day, all present, a little routine work was done; seals for

the Supreme and Circuit Courts were designed and adopted, and some rules of practise promulgated. It was further ordered that it should be requisite to the admission of attorneys and counsellors to practise in these courts, that they should have been such for three years past in the Supreme Court of the State from which they hailed, and that their private and professional character should appear to be "fair." Upon this basis, a few of the brilliant legal lights of the time stepped forward and were admitted in accordance with the prescribed oath, to demean themselves as officers of the Court agreeably, and according to law, and that they should support the Constitution of the United States. It was also ordered that all process of the United States Courts should issue in the name of the President of the United States. Thereupon the Court adjourned to the first Monday in August following, as fixed by law, not a single litigant having appeared at their bar.

Judges there were, but of business there was none. A clerk had been appointed, but was obliged to report: "No papers on file." Elias Boudinot, Egbert Benson, Fisher Ames, Robert Morris, and Edward Livingston had been admitted to practise; but silence was unbroken by their voices in argument of their client's cases. The table was unburdened by the weight of learned briefs, and not a single decision, even in embryo, existed.

No spectator of that hour, though gifted with eagle eyes of prophecy, could have foreseen that out of that assemblage, unheard and unthought of among the tribunals of earth, a court without a writ, a docket, or a record, of unknown and untried

powers, and undetermined jurisdiction, there would develop a court which, in a single century, would cause the tables of Congress to groan beneath petitions from the American Bar and various State Bar Associations, inviting that body to devise some means for the relief of that overburdened tribunal, whose litigants are now doomed to stand in line, sometimes for the space of two or three years, before they have a chance to be heard; a court whose decrees are like silver and golden threads interwoven, of which the ancient world affords no model, and the modern world no parallel; binding in the bonds of constitutional jurisprudence, in the imperishable trinity of love, liberty, and law, the safety and dignity and longevity of our free institutions.

Republic of Republics! Nation of Nations! Thy existence is secure only as the sentiments of this most blessed trinity remain incarnate in the hearts of thy people; but "let it be remembered," as the first Chief Justice said, in his first charge to a Federal grand jury, "that civil liberty consists not in a right to every man to do just what he pleases; but it consists in an equal right to all the citizens to have, enjoy, and do, in peace, security, and without molestation, whatever the equal and constitutional laws of the country admit to be consistent with the public good."



WHILE Jay was still Chief Justice, he was nominated by the Federalists for Governor of New York, but Tammany methods had already taken root in the New York Democracy, and he was defeated by Governor Clinton, through the instrumentality of fraudulent returns. Then the daily increasing "love frenzy for France," and the repeated violation of the Treaty of Peace, both by Great Britain and the States, nearly precipitated another war with England, for which we were even less prepared than at the outbreak of the Revolution. In this crisis Washington decided to send to London a special envoy. Hamilton was his choice, but it was thought probable that his appointment would fail of confirmation in the Senate. Hamilton then proposed the name of Jay, and after three days of violent debate in the Senate, his appointment was finally confirmed.

"You can not imagine," wrote Adams to his wife the day of the final vote, "what horrors some persons are in, lest peace should continue. The prospect of peace throws them into distress. . . . The opposition to Mr. Jay has been quickened by motives which always influence everything in an elective government. . . . If Jay should succeed, it will recommend him to the choice of the people for President, as soon as a vacancy shall happen. This will weaken the hopes of the Southern States for Jefferson. This I believe to be the secret motive of the opposition to him, though other things were alleged as ostensible reasons, such as his monarchical principles, his indifference about the navigation of the Mississippi, his attachment to England, his aversion to France, none of which are well

founded, and his holding the office of Chief Justice."

The learned Dr. Carnahan, who became president of Princeton College in 1823, in his lectures on moral philosophy, used to quote a conversation between Jay and some friends at this time that was told him by an earwitness, as a striking instance of courageous patriotism: "Before the appointment was made, the subject was spoken of in the presence of Jay, and Jay remarked that such were the prejudices of the American people, that no man could form a treaty with Great Britain, however advantageous it might be to the country, who would not by his agency render himself so unpopular and odious as to blast all hope of political preferment. It was suggested to Mr. Jay that he was the person to whom this odious office was likely to be offered. 'Well,' replied Mr. Jay, 'if Washington shall think fit to call me to perform this service, I will go and perform it to the best of my abilities, foreseeing as I do the consequences to my personal popularity. The good of my country I believe demands the sacrifice, and I am ready to make it.'"

And though the treaty concluded between Jay and Grenville now appears, in the light of history, to have been a very fair one for both countries, Jay's predictions on the effect it would have upon his popularity at that time were not far astray, notwithstanding that on his return, after a year's absence, he found that he had, in spite of Tammany methods, finally been elected Governor of his State, and he thereupon resigned his Chief Justiceship.

The complaints to be adjusted between the two

countries were numerous and complicated. Great Britain, on the one hand, had retained the Western military posts in violation of the Treaty of Peace, and had made no compensation for the negro slaves carried away by her officers; on the other hand, several of the States had prevented the collection of debts due English merchants contracted before the Revolution. The boundaries of the United States on the west and northeast were unsettled. Great Britain finally complained of damage to her commerce by French privateers fitted out in American ports; while the United States complained of similar damage through irregular captures by British cruisers. And Jay gained for America about all she deserved, even according to Andrew Jackson, who in later years remarked that "Jay's treaty was a masterpiece of diplomacy, considering the circumstances of this country," while some such thoughts must have been in Lord Sheffield's mind when, at the outbreak of the war of 1812, he remarked: "We have now a complete opportunity of getting rid of that most impolitic treaty of 1794, when Lord Grenville was so perfectly duped by Jay." The treaty was ratified by the United States Senate, too, with the exception of an article about the West India trade, but its contents were not made public until after Jay's inauguration as Governor. Here is a sketch of the exciting scenes which followed.

"Even before its contents were known," says Pellew, "letters signed 'Franklin,' appeared abusing the treaty; and in Philadelphia an effigy of Jay was placed in the pillory, and finally taken down, guillotined, the clothes fired, and the body blown

up. It was clear, then, that it was not this particular treaty, but any treaty at all with Great Britain, that excited the wrath of the Republicans. On July 4 toasts insulting Jay, or making odious puns on his name, were the fashion. Two days after a copy of the treaty reached Boston, a mass meeting was called, though there had been no time to consider it, and condemnatory resolutions were passed. In New York similar action was had. Hamilton tried to make himself heard, but was stopped by a volley of stones, and the treaty and a picture of Jay were burned on the Bowery. One effigy represented Jay holding a pair of scales, with the treaty on one side and a bag of gold on the other, while from his mouth proceeded this label, 'Come up to my price, and I will sell you my country.' "

James Savidge, once president of the Massachusetts Historical Society, told his grandson that he remembered seeing these words chalked in large white letters around the inclosure of Mr. Robert Treat Paine:—

"Damn John Jay! Damn every one that won't damn John Jay!! Damn every one that won't put lights in his windows and sit up all night damning John Jay!!!"

Throughout the storm of vituperation Jay himself remained calm and philosophical. "As to my negotiations and the treaty," he wrote to Judge Cushing, "I left this country well convinced that it would not receive anti-Federal approbation; besides, I had read the history of Greece, and was apprized of the politics and proceedings of more recent date. . . . Calumny is seldom durable; it will in time yield to truth."

He had done his duty, though by so doing he undoubtedly lost the Presidency of the United States.



F Jay's Governorship, there is but little to be said that could not be related of most any State Governor. He served the people honorably and well, and when his two terms were finished, the freeholders of the State, regardless of party, passed resolutions commending his public service, and regretting his retirement. Here, however, are a few items that are worthy of mentioning.

Governor Wolcott, of Connecticut, asked Jay to exercise the pardoning power vested in him, in behalf of a young man of good family, who had been convicted in the New York courts of forgery. Governor Jay replied: "Justice . . . can not look with more favorable eye on those who become criminals, in spite of a good education and of good examples, than of those other offenders who from infancy have lived destitute of those advantages."

The Governor incurred odium by refusing to order the flags to be hoisted on Governor's Island and the Battery on the anniversary of the Tammany Society. The reason given was, that "if such a compliment be paid to the Tammany, it ought not to be refused to any of the numerous societies in this city and State."

Jay, himself, was a slaveholder, in a certain sense. "I have three male and three female slaves," he wrote in a return of his property to the

Albany assessors; "five of them are with me in this city of New York. I purchase slaves and manumit them at proper ages, and when their faithful services shall have a reasonable retribution." Perhaps the Governor's practise in this respect may have suggested the practical manner of emancipation, as enacted by the New York Legislature in 1799.

In the spring of 1800, Aaron Burr appeared in the political arena as a Republican leader, and made such inroads on Federalists that even Hamilton, disregarding the previous record of his party, wrote to Governor Jay urging him to call an extra session of the Legislature to pass measures for districting the State, as a means of thwarting Burr's plans. Philip Schuyler wrote to the same effect, saying that Marshall was of the same opinion. "Your friends will justify it," he continued, "as the only means to save a nation from more disasters, which it must and probably will experience from the misrule of a man who has given such strong evidence that he is opposed to the salutary measures of those who have been heretofore at the helm, and who is, in fact, pervaded with the mad French philosophy."

Jay, though as stalwart a Federalist as any, nevertheless did not believe that a good end ever justified bad means; and he contented himself with simply endorsing on Hamilton's letters the significant words: "Proposing a measure for party purpose which I think it would not become me to adopt."

At the close of Jay's second term, the Federalists, in a complimentary address, urged him to con-

sent to be renominated. "The period is now nearly arrived," was Jay's answer, "at which for many years I have intended to retire from the cares of public life, and for which I have been for more than two years preparing. Not perceiving, after mature consideration, that my duties require me to postpone it, I shall retire accordingly." "He was unmoved even by the complimentary letter of President Adams, announcing his unsolicited nomination and confirmation, a second time, as Chief Justice of the United States," says Pellew. "I had no permission from you," said President Adams, "to take this step, but it appeared to me that Providence had thrown in my way an opportunity, not only of marking to the public the spot where, in my opinion, the greatest mass of worth remained collected in one individual, but of furnishing my country with the best security its inhabitants afforded against its increasing dissolution of morals." "I left the bench," Jay replied, "perfectly convinced that under a system so defective it would not obtain the energy, weight, and dignity which was essential to its affording due support to the national government; nor acquire the public confidence and respect which, as the last resort of the justice of the nation, it should possess. Hence I am induced to doubt both the propriety and the expediency of my returning to the bench under the present system. . . . Independently of these considerations, the state of my health removes every doubt."



JOHN JAY, in returning from public to private life, resorted to the peace and quiet of the farm. Henceforth, it is John Jay, the farmer. Some say he was an artistocrat, but what of it? The same has been said of Washington, of Hamilton, of Adams, and of Franklin, and all of them doubtless were, but it was the aristocracy of the brain, that springs from the democracy of the soul. Jefferson and Aaron Burr may have possessed more genius, but Jay and those classed with him showed more common sense, and that is the thing that counts in the founding of a nation. As one of the immortal ten, mentioned by a great English statesman, who gave "order, stability, and direction to the cause of American independence," the name of John Jay is secure. What France lost when Louis the Great, called by Carlyle "Louis the Little," banished Huguenots, America gained, and we ought to be especially thankful. Tyranny and intolerance always drive from their homes the best; those who have the ability to think, the courage to act, a dignity to preserve, and a pride that can not be coerced. Such was the heritage of John Jay, and it served well in the cause of American independence, and in the founding of this great republic.

The fact that he was wealthy for his time is no disgrace. It can hardly be said that he came by it dishonestly, for it was for the most part inherited, and there is no record that in settling the estates of Mr. and Mrs. Peter Jay, he bought any of his brothers off with a mess of pottage. His Bedford estate was quite as extended as that of any farmer in Westchester County, and he entered upon it

with the same zeal and energy as he had displayed in public life. He erected handsome buildings for the comfort of his family, and to shelter his live stock, and in which to store the products of his soil. It had been his ambition for years to be a successful farmer — an ambition which he doubtless added to through close acquaintance with George Washington and occasional visits to beautiful Mount Vernon.

Of course, Jay did but little of the heavy work, he left that to his tenants and servants; but he was his own overseer, his own agriculturist, his own horticulturist, his own stock buyer, and his own selling agent, deriving "more satisfaction," as he once wrote to Judge Peters, "from attending to vines and fruit trees than most conquerors do from cultivating their favorite laurels."

And so, at the conclusion of his Governorship, he retired with his family to Bedford to enjoy the long-deserved society of the wife he loved, and to attend to the education of his children. But no sooner was this cup of happiness to his lips than it was dashed to the ground, for within a year death, that always unwelcome visitor, entered his home, and the spirit of the beautiful and loving Mrs. Sarah Livingston-Jay took its flight.

Since their marriage they had been pained by repeated separations, made necessary by the husband's public duties, but their love for each other was ever great, so great, indeed, as to provoke the gentle raillery of their friends. Even the docile Benjamin Franklin used to joke with Mrs. Jay, and tried to arouse her jealousy, as the story runs in one of her letters, written while she was in Paris, and Jay was in England.

"Dr. Franklin charges me to present you his compliments," she says, "whenever I write to you, but forbids my telling you how much pains he takes to excite my jealousy at your stay. The other evening, at Passy, he produced several pieces of steel; the one he supposed you at Chaillot, which being placed near another piece, which was to represent me, it was attached by that, and presently united; but when drawn off from me, and near another piece, which the Doctor called an English lady, behold, the same effect! The company enjoyed it much, and urged me to revenge; but all could not shake my faith in my beloved friend." "It gives me pleasure," was Jay's reply from Bath, "to hear that the Doctor is in such good spirits. Though his magnets love society, they are nevertheless true to the pole, and in that I hope to resemble them."

And he did — quite so. Never to the day of her death — or his — did Jay come to sink the lover in the husband. "Tell me," he once wrote to her, referring to her eyes that he had not seen for months, "tell me, are they as bright as ever?" and her letters to him were what she was always fond of calling, "little messengers of love."

What influence Sarah Livingston, as the wife of John Jay, had upon his private and public life, it is impossible to estimate, but it must have been immense. For with a good wife, man is still in the majority, even though the whole world be against him. The love, the confidence, and the hope of one good woman is worth more in the development of the individual than all the favors that kings and princes can bestow. And John Jay was just the kind of a man that deserves such love, that inspires

such confidence, and strews the pathway of such hopes with flowers. Deception being outside the category of his talents, it is to be believed that he returned all the love and confidence he received. As to his hopes that some day they would be settled together, as they now were for almost the first time in their life, in a home, her sudden death was a most severe shock, and it told plainly on his already shattered nerves.

"The habit of reticence grew upon him," one writer tells us, "until he could not be tricked into giving an opinion even about the weather;" but his daughters made his home ideal, and with love and gentleness soothed his declining years.

He lived out his days as a partial recluse, though his home was ever open to old friends, and public men were frequent callers. Besides, he kept up a correspondence with Wilberforce, of England, and Lafayette, of France, which, together with the work of his farm, the problems of church, and the village politics, filled his latter days.

These furnished healthful exercise for his tireless brain, which refused to run down; but the problems of statecraft he left to other heads and hands.

Time, then, was kindly, and sent Death, its Peace Envoy, as Autumn, the Ambassador of Winter, gathers the leaves.

THIS IS THE END OF "THE EARTHLY PILGRIMAGE OF JOHN JAY," AS RELATED BY JOHN HENRY ZUVER, WHO, HAVING ENJOYED NO PERSONAL ACQUAINTANCE WITH THAT ESTIMABLE GENTLEMAN, PLEADS GUILTY TO HAVING READ —

Flander's "Lives of the Chief Justices," Carson's "History of the Supreme Court," William Jay's "Letters of John Jay," Pellew's "Biography of John Jay," and letters and biographies of Washington, Adams, Franklin, Hamilton, Jefferson, and others too numerous to mention —

AND USED THE KNOWLEDGE THUS ACQUIRED, WITH ADDITIONS, SUBTRACTIONS, MULTIPLICATIONS, AND DIVISIONS, MADE BY HIS OWN HEAD AND HAND, TO FIT THE PAGES OF THIS TOME OF "EARTHLY PILGRIMAGES OF THE CHIEF JUSTICES OF THE UNITED STATES SUPREME COURT," PUBLISHED BY THE ASSOCIATED LAWYERS' PUBLISHING COMPANY, AND DONE INTO BOOK BY THE LEADLEAF PRESS AT THEIR SHOP, WHICH IS IN BATTLE CREEK, MICHIGAN, U. S. A.

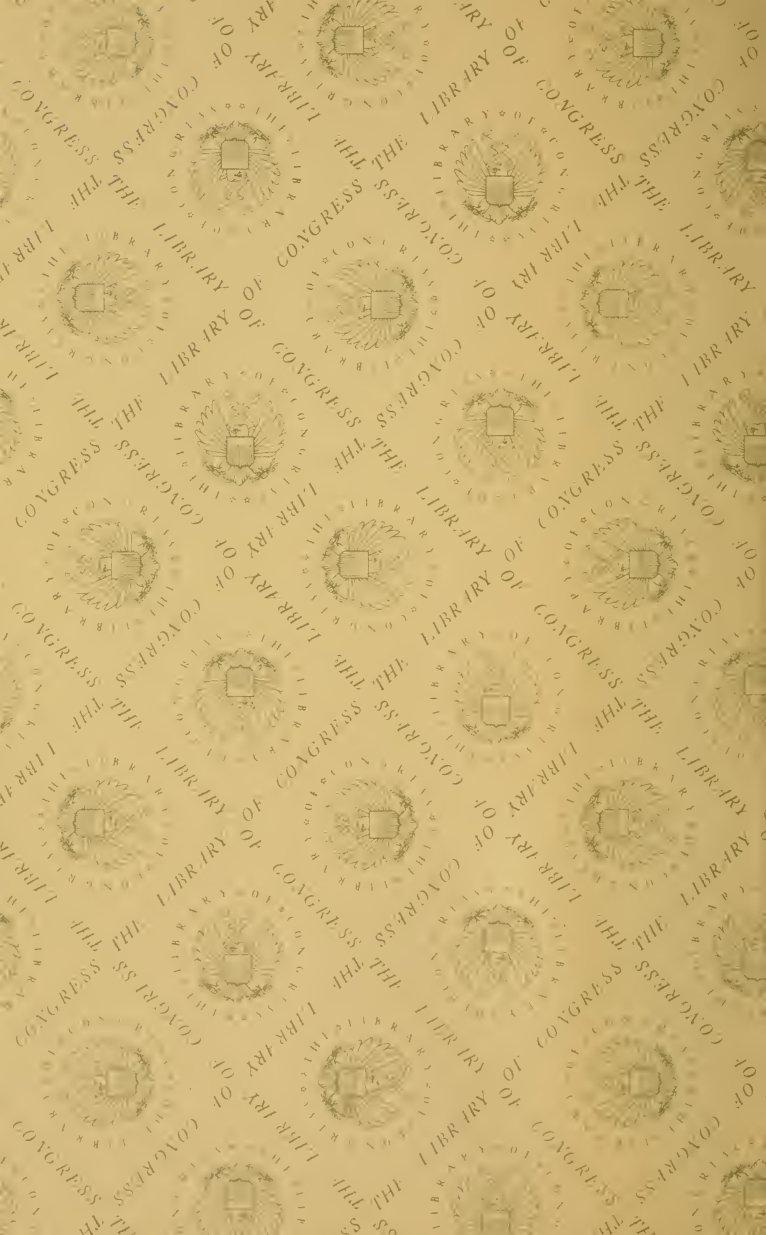


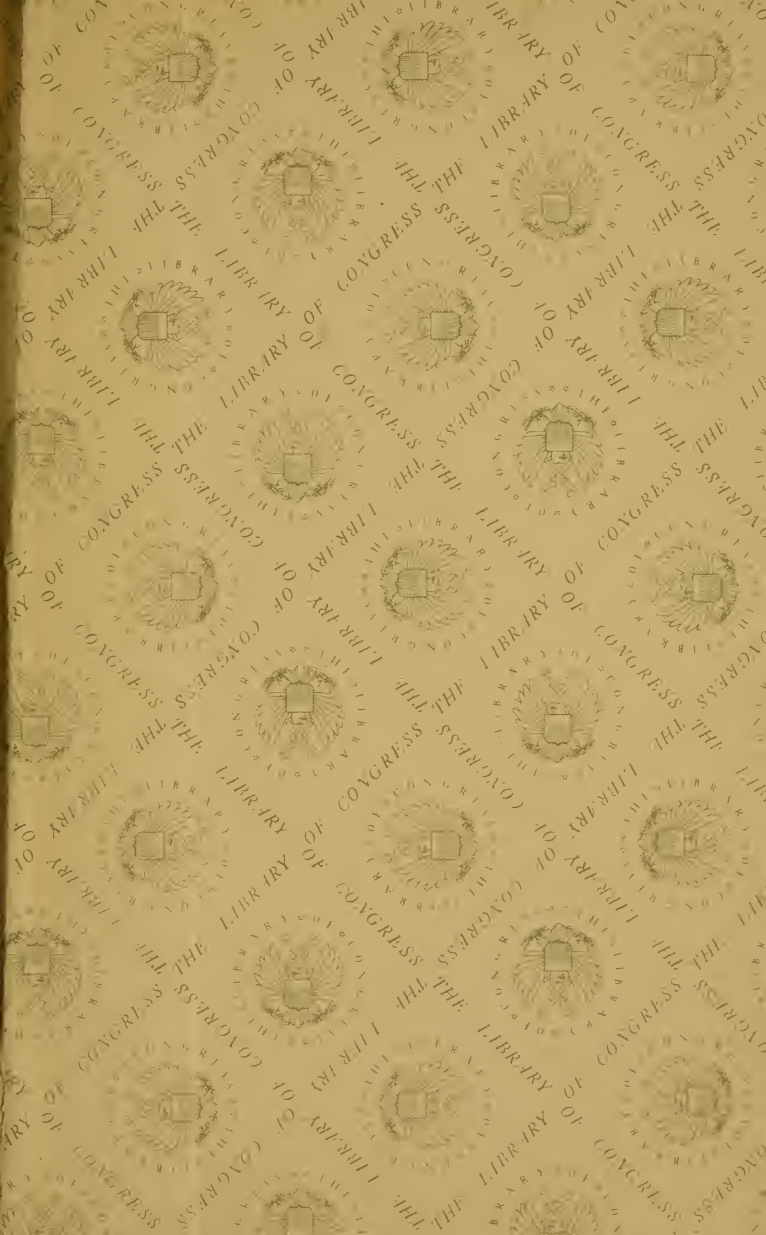




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